STATE OF MICHIGAN

IN THE SUPREME COURT

CAROL KRUSCHKE.,

Plaintiff/Appellant,

v

JAMES R. LOVELL, M.D.
and JAMES R. LOVELL
M.D., P.C.,

Defendant/Appellees.

Lower Court File No: 03-40879-NH

Docket No: 259601

130030

Plaintiff/Appellant's Brief In Opposition To Defendants/Appellees' Application For Leave To Appeal

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Counter-Statement Of Order Appealed And Relief Requested

This is a medical malpractice action. On 18 April, 1998, plaintiff Carol Kruschke underwent an unnecessary hysterectomy performed by James Lovell, M.D., a gynecologist in Marquette, Michigan. As a direct and proximate result of the malpractice, the plaintiff suffered serious injuries including, but not limited to, permanent loss of her ability to conceive and bare children, loss of her uterus and both her ovaries, injuries to her stomach and abdominal organs, and loss of her body's ability to produce estrogen and other female sex hormones, resulting in an increased risk of osteoporosis and other serious medical conditions.

On 14 July, 2004, defendants/Appellees James Lovell, M.D., and his professional corporation brought a motion for summary disposition pursuant to *MCR 2.116(C)(7)*, claiming that the plaintiff/appellant's complaint was not filed within the applicable statute of limitation. Specifically, the defendants/appellees contended that Ms. Kruschke knew or should have known of the possible medical malpractice claim following the 18 April, 1998, surgery, and therefore the statute of limitation expired in April 2000. The plaintiff/appellant resisted the defendants' motion for summary disposition based upon the statute of limitation in all respects. The trial court granted the defendants'/appellees' motion and entered an order dismissing the plaintiff/appellant claims on 1 December, 2004. **(Exhibit 1)**

The plaintiff then timely filed an appeal as of right with the Michigan Court of Appeals. On 3 November, 2005, in a 2-1 unpublished per curiam decision, the appellant court reversed the trial

court's order granting summary disposition. **(Exhibit 2)** In this decision, the court of appeals majority held that under the factual circumstances presented in the case at bar, although the plaintiff had knowledge that she had undergone a hysterectomy, she did not have reason to believe that the hysterectomy was unnecessary until a physician conveyed that opinion to her in October 2002. The court of appeals majority also stated that even though the plaintiff was experiencing some pain following the surgery, there was nothing in the records suggesting that this led her to believe that the hysterectomy itself was not medically warranted, nor was there any evidence associating the pain with an unnecessary hysterectomy.

The defendants/appellees now submit the present application for leave to appeal and claim the court of appeals erred matter of law in failing to find the statute of limitation barred the plaintiff's claim. Plaintiff/appellant submits that the majority decision of the court of appeals correctly determined that there was no evidence to suggest that the plaintiff knew or should have known that her hysterectomy was a medically unnecessary procedure. It was not until she was later told by another physician that her hysterectomy was medically unnecessary that she first became aware of a potential medical malpractice claim. The court of appeals majority decision is further supported by the fact that defendant Lovell assured the plaintiff/appellant on at least two occasions that the full hysterectomy he performed was reasonable and necessary under the circumstances. Therefore, the plaintiff/appellant respectfully requests that this Court deny the defendants/appellees' application for leave to appeal as the majority decision of the court of appeals was properly decided and needs no further clarification.

Counter-Statement Of Questions Involved

1. **Was it reasonable for Carol Kruschke not to know medical malpractice had occurred when she was repeatedly told by Dr. Lovell following the 18 April, 1998, surgery that the removal of her fallopian tubes, ovaries, and uterus was reasonable and necessary?**

Answer: The plaintiff/appellant, Carol Kruschke answers, "Yes,"

The defendants/appellees, James R. Lovell, M.D., and James R Lovell, P.C., answer, "No,"

The trial court answered, "No,"

The majority of the Court of Appeals answered, "Yes."

2. **Prior to October 2002, did Carol Kruschke have any evidence or reason to believe Dr. Lovell's action in removing her fallopian tubes, ovaries, and uterus was inappropriate or medically unnecessary?**

Answer: The plaintiff/appellant, Carol Kruschke answers, "No,"

The defendants/appellees, James R. Lovell, M.D., and James R. Lovell, P.C., answer, "Yes,"

The trial court answered, "Yes,"

The majority of the Court of Appeals answered, "No."

3. **Under Michigan's discovery rule, was the present action filed within six months of the date when Carol Kruschke discovered or should have discovered Dr. Lovell's medical malpractice?**

Answer: The plaintiff/appellant, Carol Kruschke answers, "Yes,"

The defendants/appellees, James R. Lovell, M.D., and James R. Lovell, P.C., answer, "No,"

The trial court answered, "No,"

The majority of the Court of Appeals answered, "Yes."

4. **Did the majority of the court of appeals properly conclude that when viewing the evidence in a light most favorable to the plaintiff, the trial court erred as a matter of law in dismissing the claim because the plaintiff/appellant filed her lawsuit within six months of discovering the potential medical malpractice?**

Answer: The plaintiff/appellant, Carol Kruschke answers, "Yes,"

The defendants/appellees, James R. Lovell, M.D., and James R. Lovell, P.C., answer, "No,"

The majority of the Court of Appeals answered, "Yes."

5. Because the court of appeals majority decision was properly decided, does this Court need to further clarify any of the issues presented in this action?

Answer: The plaintiff/appellant, Carol Kruschke answers, "No,"

The defendants/appellees, James R. Lovell, M.D., and James R. Lovell, P.C., answer, "Yes,"

The majority of the Court of Appeals answered, "No."

Standard Of Review

When a party moves for summary disposition pursuant to *MCR 2.116(C)(7)*, the court reviews the validity of the movant's claim by considering any affidavits, pleadings, depositions, admissions and documentary evidence then filed or submitted by the parties. If there is no factual dispute, the question of whether the claim is statutorily barred is one of law for the court to decide. *Taxpayors Allied for Constitutional Taxation v Wayne City, 203 Mich App 537, 513 NW2d 202 (1994)*. Summary disposition pursuant to *MCR 2.116(C)(7)* should not be granted unless no factual development could provide a basis for recovery. *Harrison v Director of Department of Corrections, 194 Mich App 446, 487 NW2d 799 (1992)*.

Counter-Statement Of Facts And Material Proceedings

1. The 18 April, 1998, Surgery: Dr. Lovell Does Not Level With Ms. Kruschke About The Surgical Outcome

On 17 April, 1998, then thirty-six year old Carol Kruschke presented to the Marquette General Hospital emergency room with severe left-sided pelvic pain. Her medical history included a diagnostic laparoscopy in 1985 with the finding of right-sided, apparently benign ovarian cysts, laparoscopic cholecystectomy, laser vaporization of the cervix for dysplasia in 1992, and recent vague left-sided pelvic pain with diagnosis of an eight centimeter left adnexal cystic mass by ultrasound. She was evaluated by defendant James Lovell, M.D., a gynecologist. Ms. Kruschke had been a patient at Dr. Lovell's gynecological clinic since 1993. Dr. Lovell examined her in the emergency room and found her to have a slightly elevated white blood count and a somewhat tender left adnexal mass. He admitted her to the hospital for further evaluation and treatment, including diagnostic laparoscopy with possible laparotomy.

Prior to the surgery, Ms. Kruschke signed a Consent for Operation and/or Other Procedure authorizing the performance of a diagnostic laparoscopy with possible laparotomy to be performed by Dr. Lovell. On the back side of the informed consent form, Ms. Kruschke wrote:

> Dr. Lovell said he would only take what reproductive organs – uterus & ovaries that looked diseased. He would leave in what he could – I don't prefer a total hysterectomy at age 36. (A copy of the consent for operation and Ms. Kruschke's handwritten note are attached as **Exhibit 3**.)

On 18 April, 1998, Dr. Lovell performed the initial diagnostic laparoscopy. During the surgery, the laparoscopy was converted into a laparotomy with extensive intra-pelvic adhesiolysis for immobilization of adnexae, excision of a large left ovarian cyst, right salpingo-oophorectomy, and total abdominal hysterectomy. (A copy of the history and physical and the operative report are attached as **Exhibit 4**.) Following surgery, Ms. Kruschke's left ovary and fallopian tube, right ovary and fallopian tube, and uterus were submitted to pathology. The final diagnosis from pathology was: left ovary and tube – normal tube; endometrioma and endometriosis of ovary; right ovary and tube – endometriosis; uterus – normal cervix; secretory edometrium. (A copy of the pathology report is attached as **Exhibit 5**.)

During his deposition, Dr. Lovell testified that following surgery, he explained to Ms. Kruschke what the surgery entailed and that he had removed the right and left ovaries and fallopian tubes, as well as her uterus. Specifically, Dr. Lovell testified:

Q I take it that you followed up with -- with Carol Kruschke after you did the surgery?

A Yes.

Q The -- I suspect that you would have gone in and seen her after the surgery was done; correct?

A That's correct.

Q And did you tell her what you had done?

A I do not recall the precise conversation, but I am certain that I did.

Q Uh-huh (affirmative). I take it that you told her that it was necessary for you to do what you did; correct?

A Yes.

Q Do you remember what her response was?

A I do not.

Q Did you see her after she was released from the hospital?

A Yes, I did.

Q How many times did you see her post-operatively?

A Five.

Q Okay. When's the last time that you saw her?

A The last time that I saw her was the 2nd of March '99.

Q Okay.

A I'm certain about -- yes, that was it.

Q And the times that you saw her post-surgically are part of Exhibit 1, the notes that you kept contemporaneous with your meetings with her; correct?

A That's correct.

Q Did you ever tell her, during any of those meetings, that it wasn't medically necessary for you to remove any of the organs that you did?

A I did not.

Q Did you, at any time, have a discussion with her during those meetings regarding what you did and why you did it?

A Yes.

Q And what date was that? When I say what you did and why you did it, I'm talking about the surgery. I assume you understood.

A I understood. Well, I saw her for her initial follow-up visit approximately six weeks after the surgery on the 3rd of June, and

at that time, I have entered in the record that I had a lengthy discussion as to the findings at the time of the surgery, the surgery itself, and then the pathology report.

Q Did you tell her, at that time, that you believe it was medically necessary for you to remove the organs that you did?

A I'm certain I did.

Q Do you remember anything she said to you during that meeting?

A No, I don't. (James Lovell, M.D., deposition, pp 42-44; Dr. Lovell's entire deposition transcript is attached at **Exhibit 6**)

In the six week post-operative office visit note dated 3 June, 1998, Dr. Lovell documented that Ms. Kruschke had multiple questions about what actually happened at the time of surgery. Under recommendations, Dr. Lovell reported that "After a lengthy discussion as to the findings at the time of surgery and the surgery itself, I then discussed the pathology report to the patient's satisfaction." (A copy of the 3 June, 1998, office note is attached at **Exhibit 7**) Thus, as of 3 June, 1998, Dr. Lovell had on at least two occasions explicitly told Ms. Kruschke that the removal of her fallopian tubes, ovaries, and uterus was reasonable and medically necessary. According to Dr. Lovell's own note, his medical explanation was satisfactory to Ms. Kruschke, who had no reason to dispute the assurance she was given by her treating physician that the nature and extent of the surgery was reasonable and necessary.

Following the six week post-operative check, Ms. Kruschke continued to follow with Dr. Lovell's office and likewise saw Licia Raymond, M.D., for estrogen replacement services. At no

time was Carol Kruschke ever advised by any treating physician that Dr. Lovell potentially did anything wrong.

2. October 2002: Ms. Kruschke First Learns From Her Treating Physician, John Griffith, M.D., That The Removal Of Her Fallopian Tubes, Ovaries, And Uterus Was Unnecessary And Constituted Medical Malpractice

In October 2002, Ms. Kruschke was living in Ohio at her parent's home to help care for her father who was terminally ill. Because she needed constant medical oversight for her estrogen replacement therapy, Ms. Kruschke decided to see a gynecologist closer to the place she was living while caring for her father. On 4 October, 2002, Ms. Kruschke saw John Griffith, M.D., a gynecologist, to oversee her estrogen replacement therapy. In discussing what Dr. Griffith did and told her, Ms. Kruschke testified:

Q Did he prescribe estrogen for you?

A Yes, sir.

Q What else did he do?

A He prescribed to -- to -- to me the Estratest.

Q The estrogen he prescribed was in the patch form?

A Yes, sir.

Q As you had been taking?

A Yes, sir.

Q And he prescribed the testosterone in the --

A Oral.

Q -- oral form rather than the topical cream.

A True.

Q What else did he do?

A Well, in order for him to give me my prescriptions, he had to do an examination because that's standard practice. And in doing the examination, he noticed the scar on my stomach and asked me about it. And when I told him, he wanted to know if I had been in a life or death situation. I said, No, I hadn't.

Q And what did he say then?

A He said, Well, why did you have this hysterectomy? And I said, Because they found cysts on my ovary and I had endodometriosis (sic).

Q And what did he say?

A He asked me again if it had been something else, was there cancer involved and I told him No.

Q And what did he say?

A He wanted to know where I had had it done and I told him. And then he wanted to know if the doctor was an American doctor. Wanted to know if the doctor had been educated in the United States.

Q Why did he want to know those things?

A I have no idea. It seemed out of the ordinary to me.

Q What else did he say?

A He just kept reiterating if I had been in a life or death situation to have this surgery done. And I said, No, I hadn't. No. I told him how I presented in the emergency room, but -- and he -- he was just astounded. I mean, his -- his reaction was strong.

Q What was his reaction?

A He -- he kept asking me questions like, Where did you have this done? Are you sure the doctor was a United -- was educated in the United States? He said, Why did they do this? And I said, Because I had a -- I had ovarian cysts and way that you get a hysterectomy because you've got a ovarian cyst and endodometriosis. He said, Furthermore, when they do a hysterectomy, they part the abdominal muscles. They don't cut them anymore. He -- he -- he was very strong in what he said.

Q Did he say anything else?

A He said that -- he said if I wanted to pursue that any further legally, that he would be more than glad to be of support in a medical, professional way.

Q Is Dr. Griffith in a clinic or an office or how would you describe his practice?

A He was -- his practice was in University -- or Cleveland Clinic of the Cleveland Clinic. It was a large building.

Q Did he suggest to you that you file a lawsuit?

A He didn't go that far in those specific words.

Q What did he say?

A He said that if I want to pursue this legally in the future that I could look to him for any kind of medical professional support. That's what he said to me. And, quite frankly, I had lost my dad six months living in Ohio with my family in very close proximity. They had seen how I live and how I am and they pretty much were the ones that thought I should pursue this. They recommended that I should at least consider it, my mother and my brothers. (Carol Kruschke deposition, pp 58-60; Ms. Kruschke's entire deposition transcript is attached as **Exhibit 8**)

It was at this point that Ms. Kruschke first discovered and learned that Dr. Lovell had not leveled with her. On 3 April, 2003, within six months of her appointment with Dr. Griffith and first learning of the medical malpractice, a notice of intent was served on Dr. Lovell and his

professional corporation. The complaint, with the required affidavit of merit, was subsequently filed on 8 September, 2003, within the applicable statute of limitations.

3. The Appellate Record

On 14 July, 2004, defendants/appellees James Lovell, M.D., and his professional corporation brought a motion for summary disposition pursuant to *MCR 2.116(C)(7),* claiming that the plaintiff/appellant's complaint was not filed within the applicable statute of limitation. Specifically, the defendants/appellees contended that Ms. Kruschke knew or should have known of the possible medical malpractice claim following the 18 April, 1998, surgery, and therefore the statute of limitations expired in April 2000. The plaintiff/appellant resisted the defendants' motion for summary disposition based upon the statute of limitations in all respects. A hearing before the trial court on the defendants/appellees' motion was held on 12 November, 2004. The trial court granted the defendants/appellees motion and entered an order dismissing the plaintiff/appellant's claims on 1 December, 2004.

The plaintiff/appellant argued that following the 18 April, 1998, surgery, Carol Kruschke was repeatedly told by Dr. Lovell that the removal of her fallopian tubes, ovaries, and uterus was medically indicated and necessary. At no time did any treating physician ever tell her or indicate that what Dr. Lovell had done was wrong. It was not until 4 October, 2002, when she saw an obstetrician/gynecologist in Ohio, that she first learned the surgery she underwent and the removal of her reproductive organs was unnecessary. That was the first time she had any reason to believe that Dr. Lovell had committed medical malpractice in performing the 18 April, 1998,

surgery. Within six months after discovering that the nature and extent of the 18 April, 1998, surgery was unnecessary, Ms. Kruschke filed a notice of intent to file a medical malpractice claim, and then timely filed a complaint and jury demand with the requisite affidavit of merit.

Thus, it was the plaintiff/appellant's position that the present claim was timely instituted within six months of discovering Dr. Lovell's malpractice pursuant to *MCL 600.5838(a)(3),* and the trial court erred as a matter of law in dismissing the plaintiff/appellant's lawsuit. The plaintiff/appellant then filed a claim of appeal as of right requesting that the trial court's decision dismissing the plaintiff's complaint based upon the statute of limitation must be reversed and remanded. On 3 November, 2005, in an unpublished majority decision, the court of appeals reversed the trial court's decision and found that the plaintiff's complaint was filed within six months of the time that the plaintiff learned she had undergone a medically unnecessary hysterectomy. In its decision, the majority of the court of appeals stated in relevant part as follows:

> Here, it is extremely important to focus on the nature of the claimed injury. Plaintiff maintains that Dr. Lovell performed an unnecessary, complete hysterectomy. Such a claim would not necessarily reveal or manifest itself by way of pain or other physical symptoms as is the case in most medical malpractice actions; it is strictly a matter of having the medical information, knowledge, and expertise necessary to realize that a surgical procedure was unwarranted. A careful review of plaintiff's deposition testimony does not disclose that plaintiff believed or had any reason to believe that the hysterectomy was medically unnecessary, such that she should have timely sought an opinion from another doctor after the fact regarding the necessity of the surgery. Indeed, in post-operative office visits, Dr. Lovell reinforced to plaintiff that the hysterectomy was medically necessary.

> There is no evidence that any doctor, prior to plaintiff's treatment with Dr. Griffith, informed her that the hysterectomy was unnecessary. While plaintiff may have been upset with defendant Lovell for performing the hysterectomy because of notice issues or simply because of the nature of such an overwhelming serious and personal surgical procedure, we find nothing in the record of suggesting that she questioned or had doubts about the medical necessity of the hysterectomy following the surgery. Moreover, there is absolutely no indication whatsoever in the records that plaintiff herself had the medical acumen to question the necessity of having a hysterectomy performed. Additionally, there is nothing in the factual history of this case that would lead a reasonable person, who lacks a medical background, to question the necessity of the surgery at the time of the hysterectomy. We cannot help but wonder aloud how a female layperson would discover, with any degree of certainty or accuracy, the existence of an unnecessary hysterectomy without being informed of such by a doctor, and we do not believe that it was incumbent upon plaintiff, under the circumstances, to search out other doctors in order to seek a second opinion regarding the necessity of the surgery and to determine the existence of a malpractice claim. Indeed, it was a matter of mere happenstance that Dr. Griffith volunteered his opinion that the hysterectomy was unnecessary, where plaintiff did not see him in an attempt to procure such an opinion. Plaintiff acted as diligently as could be expected under the scenario that played out in this case. On the basis of objective facts, plaintiff did not discover, nor should she have discovered, a possible cause of action for an unnecessary hysterectomy until October 2002 when she saw Dr. Griffith. (Court of Appeals decision, pp 4-5)

The majority of the court of appeals also rejected the defendants' contention that because the plaintiff knew early on that a hysterectomy had been performed, that knowledge in and of itself commenced the running of the discovery period. In addition, with respect to the defense argument that the plaintiff was on notice of a potential malpractice action because she experienced pain following her surgery, the court of appeals stated that even though the plaintiff was experiencing some pain following the surgery, there was nothing in the records suggesting that this led her to believe that the

hysterectomy itself was not medically warranted, nor was there any evidence associating the pain with an unnecessary hysterectomy. In addition, the court of appeals also noted:

> Our case provides an even more compelling basis to utilize the discovery rule. Here, plaintiff was not informed of the possibility that the hysterectomy was unnecessary until 2002; there is no evidence that Dr. Lovell or Dr. Raymond informed her of such a possibility. To the contrary, Lovell told plaintiff that the surgery was necessary. Futhermore, there is no indication in the record that plaintiff's physical symptoms could be attributed to an unnecessary hysterectomy. In other words, as opposed to the situation in *Kermizian* where the symptoms of incontinence was a result of an allegedly botched prostate surgery, plaintiff's occasional pain, based on the records before us, does not evidence that defendant doctor committed medical malpractice by performing an unnecessary hysterectomy; there is no correlation.
>
> Accordingly, the six-month discovery period did not commence to run until plaintiff was informed by Dr. Griffith that the hysterectomy was not medically appropriate, and, hence, the medical malpractice action was timely filed, which we find as a matter of law. (Court of Appeals decision, p 7)

Argument

A. Under Michigan's Discovery Rule For Medical Malpractice Actions, The Majority Of The Court Of Appeal Properly Decided That The Plaintiff's Complaint Against Dr. Lovell And His Professional Corporation Was Filed In A Timely Manner

In a medical malpractice action, the general period of limitation is two years. *MCL 600.5805(6).* A cause of action accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. *MCL 600.5838(a).* However, in a case where there is permanent loss of a reproductive organ

resulting in the inability to procreate, the applicable statute of limitations is two years "or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." *MCL 600.5838(a)(3)*.

In this action, it is undisputed that Ms. Kruschke had permanent removal of her reproductive organs, resulting in the inability to procreate. The majority of the court of appeals held that the present complaint was timely filed and that she filed the notice of intent within six months after she first discovered the existence of the medical malpractice action against Dr. Lovell following her appointment with Dr. Griffith on 4 October, 2002.

In *Sullins v Henry Ford Health System, 1999 WL 33444310 (Mich App, 1999)*, the Court of Appeals, in an unpublished decision which is attached at **Exhibit 9**, reversed the trial court's grant of summary disposition and held that the six month discovery rule found in *MCL 600.5838a(2)* saved the plaintiff's medical malpractice claim because he did not discover the basis of his claim until nearly four years later when he first learned that his surgeon had failed to remove all of his cancer during a surgery in January 1991. The *Sullins* court analyzed application of the discovery rule in a medical malpractice action and stated as follows:

> The discovery rule does not require that a plaintiff know with certainty or likelihood that a defendant committed malpractice. *Solowy v. Oakwood Hospital Corp, 454 Mich. 214, 222; 561 NW2d 843 (1997)*. Rather, as correctly observed by the parties and the trial court below, the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a "possible cause of action." [*Moll v. Abbot Laboratories, 444 Mich. 1;506 NW2d 816 (1993)*] The "possible cause of action" standard was announced by our Supreme Court in *Moll,*

supra, which involved pharmaceutical products liability claims. The Court then applied that standard in [*Gebhardt v. O'Rourke, 444 Mich 535; 510 NW2d 900 (1994)*] which involved a claim of legal malpractice and which was the case relied on by the court below, and most recently applied that standard in *Solowy, supra,* a medical malpractice case. Unfortunately, the instant trial court did not have the benefit of our Supreme Court's decision in *Solowy* because the Court decided *Solowy* five days after the trial court held the hearing and issued its orders granting summary disposition in this case. We believe that *Solowy* is controlling and is instructive in deciding the issue in this case, where both cases involve claims of medical malpractice based on a recurrence of cancer.

The Court in *Solowy* held that under the "possible cause of action" standard, the six-month discovery rule period begins to run "when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician." *Id. at 232*; emphasis added. The Court noted that

> [w]hile according to *Moll*, the "possible cause of action" standard requires less knowledge than a "likely cause of action standard," it still requires that he plaintiff possess at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act. In other words, the "possible cause of action" standard is not an "anything is possible standard." [*Solowy, supra at 226.*]

The Court advised that in the context of a delayed diagnosis, which we conclude includes the instant case, courts should maintain a flexible approach in applying the standard. *Id. at 226, 232.* The Court stated that "[in applying this flexible approach, courts should consider the totality of information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition." *Id. at 227. Sullins v Henry Ford Health System, 1999 WL 33444310 (Mich App, 1999)*

When considering the totality of the information available to Carol Kruschke, coupled with the reassurances by Dr. Lovell that the laparotomy and removal of her fallopian tubes, ovaries, and

uterus was reasonable and necessary, it is clear that Ms. Kruschke did not know of a possible cause of action against Dr. Lovell until October 2002 when Dr. Griffith informed her that the surgery was unnecessary and improperly performed. There was no indication she was ever **injured** or subjected to **negligent** treatment as required by the case law. She knew she had lost reproductive organs, but she was told this was inevitable and natural result of the necessary surgical procedure.

There is no dispute that Ms. Kruschke knew that her fallopian tubes, ovaries, and uterus were removed. She likewise knew that she would require some type of estrogen replacement, probably for life. However, she did not know, nor could she have known or suspected, that Dr. Lovell had removed tissue that was not diseased. After all, Ms. Kruschke specifically noted on the back side of the consent order that Dr. Lovell indicated he would only removed diseased organs and would be as conservative as possible since Ms. Kruschke did not desire a hysterectomy at age thirty-six. Dr. Lovell's testimony corresponds with Ms. Kruschke's note. At his deposition, Dr. Lovell testified:

Q So you -- you -- you told her you planned to do, if she approved, a laparoscopy with a possible laparotomy; correct?

A Yes, sir.

Q Did you tell her you intended to do a complete hysterectomy?

A I discussed that I am certain as a possible outcome --

Q Did --

A -- depending upon the findings.

Q Did she say anything in response to you, at least what her wishes were on what you would leave and what you wouldn't leave?

A I am equally certain that the conversation did deal with the matter of being as conservative as possible.

Q Now, who would have said that, you or her?

A She probably would have said that and in all likelihood, I agreed.

Q Okay. There's a note in the chart, and I don't know if you ever saw this or not. This is the hospital chart where she wrote on 4-18-98. This is the hospital chart I received from the hospital, --

A Uh-huh (affirmative).

Q -- quote, Dr. Lovell, said he would only take what reproductive orders -- organs; uterus and ovaries that looked diseased. He would leave in what he could. I don't -- underline don't prefer a total hysterectomy at age 36, Carol S. Kruschke, 4-18-98.

A I certainly believe it's there, and I in the philosophy embodied in that statement.

Q Okay. Well, this is her statement.

A Yeah.

Q My question is, do you remember having that conversation with her?

A In all honesty, I do not remember that conversation.

Q Do you dispute that --

A No.

Q -- that conversation --

A I don't --

Q -- that conversation occurred?

A Not at all.

Q Do you -- would you agree that that was her wishes before you did the surgery?

A That definitely should have been her -- her wishes. (James Lovell, M.D., deposition, pp 27-29)

Dr. Lovell likewise did not dispute that there were alternative conservative measures, including not removing the organs that he did, during surgery. He testified:

Q Doctor, you did not have to remove the left ovary in this case, did you?

A I felt that it was appropriate.

Q You did not have to do that. I know what you -- I know your thinking and thought processes, but that did not have to be done, did it?

A I felt that it was the proper thing to do.

Q I understand that. It did not have to be done which -- for instance, would she have died after the operation if you hadn't have removed the left ovary and tube?

A No.

Q Would she have died if you had not taken out the right ovary and tube?

A No.

Q Would she have died if you had not taken out the uterus and cervix?

A No, she wouldn't have.

Q Do you know whether she would have continued to have left pelvic pain if you had not taken out the left ovary and tube?

A My strong suspicion is that her symptoms would not have abated and now she would have, in addition, an abdominal incision.

Q Doctor, we don't know that because -- at least based on certainty -- medical certainty because you didn't leave it in; correct?

A That's correct.

Q And when you have an ovary, a cyst the size of a grapefruit in a woman of her size, that could well cause pain, couldn't it?

A Yes, it could.

Q Do you agree, Doctor, medically you could have not removed the organs that you did, waited to see how she did?

A That certainly is a possibility.

Q What is certain, however, is that those organs were removed, and she was sterilized; correct?

A Yes, sir.

Q Do you agree that when an gynecological physician performs a diagnostic laparoscopy to remove an ovarian cyst, that standard practice requires you to use -- utilize the less- invasive approach to remove the cyst?

A I do.

Q Do you agree that the standard of practice requires, when doing that procedure, not to unnecessarily remove or damage otherwise healthy organs and tissues?

A I do.

Q Do you agree that, when doing that procedure, every effort should be made to preserve the ability of a woman of childbearing years to conceive and have children?

A I do.

Q And you agree that that's the standard of practice as it was in 19- --

A '98.

Q-- '98 when you undertook this work?

A That's correct. (James Lovell, M.D., deposition, pp 39 - 41)

The defendants have argued that because Ms. Kruschke knew her fallopian tubes, ovaries, and uterus had been removed, she was put on notice that a "possible" cause of action existed. However, that is simply not the case. After discussing the surgery with Dr. Lovell post-operatively and at her first six week check-up, Ms. Kruschke was satisfied regarding the necessity for the surgery as explained to her by Dr. Lovell. From that time until October 2002, she had no reason to suspect that Dr. Lovell committed medical malpractice. It was not until her first and only visit with Dr. Griffith in Ohio that Ms. Kruschke became aware of the "possible" cause of action. At that time, she took appropriate action, and the notice of intent was filed within six months of discovering the present cause of action.

Prior to that time, Ms. Kruschke was not even aware that there was a bad result from the surgery. She had been told the surgery was necessary, and she believed her treating physician, as well as the other treating physicians whom she saw after Dr. Lovell, prior to October 2002. None of those physicians or healthcare providers indicated that she should be concerned about the results of the surgery, and therefore the fact that she no longer had fallopian tubes, ovaries, or a uterus does not presuppose that she should have been thinking that medical malpractice occurred.

A similar situation was faced by a plaintiff in *Coleman v Dowd, 185 Mich App 662, 462 NW2d 809 (1990)*. In that case, a woman who became pregnant following tubal ligation filed a medical malpractice action against her physicians, alleging failure to ligate her right fallopian tube. The trial court granted summary disposition in favor of the surgeon indicating that the statute of limitations had expired. The Court of Appeals held that it was not until after the plaintiff's Cesarean section and delivery of her child that she knew or had reason to believe with any degree of certainty that the failure of the tubal ligation was due to negligent performance by her physician as opposed to any natural cause. Thus, the Court of Appeals held that the discovery of the medical malpractice claim did not occur until the Cesarean section was performed.

In *Coleman*, the plaintiff, like Ms. Kruschke in the present action, spoke with her treating physician and was told that it was possible to become pregnant even after a properly performed tubal ligation. In *Coleman*, the plaintiff acknowledged that immediately after she learned that she was pregnant, she suspected that the defendants may have improperly performed the tubal ligation. In fact, she stated she felt that "somebody had screwed up." It was at that point that her physician told her it was possible to become pregnant even after a properly performed tubal ligation, and therefore she believed her physician had not committed malpractice. It was only after her child was delivered by Cesarean section that she learned that her right fallopian tube had reportedly never been ligated.

Like the plaintiff in *Coleman*, Ms. Kruschke believed Dr. Lovell when he indicated that the laparotomy and removal of her reproductive organs was reasonable and necessary. She had no

reason not to believe her treating physician. Although she experienced pain following surgery, she likewise had experienced pain before the surgery. There was nothing to indicate to Ms. Kruschke that her problems following surgery were related to medical malpractice or a possible cause of action. Once she learned through Dr. Griffith that a possible claim existed, she did take appropriate action and the present claim was filed. The plaintiff contends that the rationale of *Coleman* is applicable to the present case and Ms. Kruschke should not be penalized for trusting and having faith in Dr. Lovell's representations in the hospital following surgery and in her post-operative check-ups at his office.

Thus, when looking at the entirety of the circumstances, the majority of the Court of Appeals correctly ruled that Carol Kruschke did not discover, nor should she have discovered, the possible cause of medical malpractice arising out of the 18 April, 1998, surgery until October 2002 when informed by Dr. Griffith of his multiple concerns. Until then, she acted appropriately and had a right to rely upon the representations made by Dr. Lovell. Because the notice of intent to file a claim was filed within six months of discovering the possible medical malpractice action, and the plaintiff's complaint was then timely filed pursuant to statute, the majority decision of the court of appeals was correctly decided.

Relief Requested

For the foregoing reasons, plaintiff/appellant Carol Kruschke, requests that this Court deny the defendants/appellees' pending application for leave to appeal in its entirety as the majority

opinion of the court of appeals properly decided that her claim was timely filed within six months from the time when she either knew or should have known of a possible medical malpractice action. Thus, the plaintiff/appellant Carol Kruschke requests that the unpublished majority decision of the court of appeals dated 3 November, 2005, be final and the case be remanded to the trial court for further proceedings.

Dated: December 30, 2005

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